CONTINENTAL CHOICE SDN BHD & ANOR v. KETUA PENGARAH HASIL DALAM NEGERI

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
S NANTHA BALAN JCA
DARRYL GOON SIEW CHYE JCA
[CIVIL APPEAL NO: W-01(A)-275-04-2018]
11 MAY 2021

REVENUE LAW: *Assessment – Liability – Real property gains tax ('RPGT') payable on gains upon disposal of shares – Whether company 'real property company' under para. 34A of Schedule 2 of Real Property Gains Tax Act 1976 – Whether shares chargeable asset for purposes of RPGT – Whether gain made in disposal 'gain' under Act*

Syarikat Bioford Development Sdn Bhd ('Bioford'), a 'controlled company' within the Income Tax Act 1967 ('ITA'), had purchased a piece of land from two companies. With the acquisition of the property, Bioford owned real property, the defined value of which exceeded 75% of its total tangible asset. The property represented in excess of 99% of Bioford's total tangible asset. The appellants each acquired 56,025 shares in Bioford but later opted to dispose of their shares. Bioford had obtained permission from the Kuala Lumpur City Hall to develop its land in a mixed development consisting of a condominium, shop office and shop lots. Towards this end, Bioford had appointed various professionals to complete this project. Bioford had also marketed its intended development extensively and, in addition, all expenditures incurred were entered into its books as property development expenditure. The appellants bought into Bioford to get involved in real property development. Following the sale of their sales in Bioford, the appellants filed relevant forms through their solicitors, together with the relevant supporting documents. Based on these documents, the Director General of Inland Revenue ('DGIR') issued notices of assessment to the appellants stating that real property gains tax ('RPGT') was payable by each of the appellants. By its notice of assessment to the first appellant, the RPGT assessed to be payable was RM108,269.70. As for the second appellant, the amount of RPGT assessed to be payable was RM496,585.20. The appellants disputed that they were liable to pay any RPGT. Pursuant to an appeal by the appellants, the SCIT had unanimously decided that Bioford was not a company subject to para. 34A of Schedule 2 of the Real Property Gains Tax Act 1976 ('RPGTA'). Consequently, the SCIT unanimously decided that the acquisitions by each of the appellants of 56,025 shares in Bioford that were subsequently disposed of by them were not subject to para 34A of Schedule 2 of the RPGTA. The effect of the SCIT's deciding order was that RGPT was not payable on the gains from the disposal of the said Bioford shares by the appellants. Dissatisfied with the decision of the SCIT, the DGIR required the

A SCIT to state a case for the opinion of the High Court pursuant to s. 34 of Schedule 5 of the ITA. The High Court allowed the DGIR's appeal and held that RGPT was payable on the gains made by the appellants upon the disposal of the Bioford shares. This was an appeal against the decision of the High Court. The main issue that arose was whether Bioford was a 'real
B property company' under para. 34A of Schedule 2 of the RPGTA.

Held (dismissing appeal with costs)
Per Darryl Goon Siew Chye JCA delivering the judgment of the court:

(1) Paragraph 34A leaves no room for any doubt as to what is to be regarded as a 'real property company' or the fact that the acquisition of shares in
C such a company is deemed the acquisition of a 'chargeable asset'. Nowhere in the legislation is it provided or even hinted that only a company that is used by its shareholder and intended as a device or means to avoid RPGT may be regarded as a 'real property company' falling within the ambit of para. 34A. Such is also not to be implied
D especially where the ordinary meaning of the expressed words employed were clear and unequivocal. (paras 67-69)

(2) Shares in what is defined as a 'real property company' were never chargeable asset for the purposes of RPGT prior to the introduction of
E para. 34A. Paragraph 34A changed that by deeming it to be so. The fact that shares in such a company had to be deemed to be 'chargeable asset' confirmed that they in fact were not or may not be, but were nevertheless to be regardless as such, by virtue of para. 34A. Such is the effect of a deeming provision. (para 74)

F **(3)** Paragraph 34 deems the acquisition of shares in 'real property company' to be an acquisition of a 'chargeable asset'. In addition, it also deems the disposal of such shares to be a disposal of a 'chargeable asset'. Rather than to deem such shares 'real property', what was done was to equate all provisions pertaining to 'chargeable asset' in the legislation, unless
G otherwise expressed, applicable to the acquisition and disposal of shares in a real property company, as defined. The net result, simply put, was RPGT would be levied on a chargeable gain made upon the disposal of shares in a real property company as defined. From the plain words employed, that was the legislative solution to the problem identified in the explanatory statement in the Finance Bill of 1998. (paras 83 & 84)

H **(4)** As a property development company, any profit that Bioford made in disposing its real property would be likely to attract income tax. As such, any gain made in such disposal would not be regarded as a 'gain' under the RPGTA. This is because under the RPGTA, 'gain' is given
I the meaning '(a) gain other than gain or profit chargeable with or exempted from income tax under the income tax law …'. Therefore, a construction of para. 34A in accordance with the plain words employed by Parliament gave rise to neither injustice nor absurdity or even

inconsistencies or incompatibilities with the purpose or object of para. 34A, when read with the explanatory statement found in the Finance Bill 1998. (paras 85 & 86)

Case(s) referred to:

Berry v. Revenue and Customs Commissioners [2011] UKUT 8 ***(refd)***

Binastra Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2003] 5 CLJ 221 HC ***(refd)***

Canadian Eagle Oil Co v. R [1946] AC 119 ***(refd)***

Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 ***(refd)***

Chin Choy & Ors v. Collector of Stamp Duties [1978] 1 LNS 26 FC ***(refd)***

Chua Lip Kong v. Director-General of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***

Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA ***(refd)***

Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership) [2015] 9 CLJ 273 FC ***(refd)***

Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal [2016] 4 CLJ 12 FC ***(refd)***

Mangin v. Inland Revenue Commissioner [1971] AC 739 ***(refd)***

National Land Finance Co-Operative Society Ltd v. Director General of Inland Revenue [1993] 4 BLJ 33 SC ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Pepper (Inspector of Taxes) v. Hart and Related Appeals [1993] 1 All ER 42 ***(refd)***

R v. Norfolk County Council (1891) 60 LJ QB 379 ***(refd)***

WT Ramsay Ltd v. IRC [1981] STC 174 ***(refd)***

Legislation referred to:

Income Tax Act 1967, Schedule 5 s. 34

Interpretation Acts 1948 and 1967, s. 17A

Real Property Gains Tax Act 1976, ss. 2, 3, 25, Schedule 2 para 34A(6)

For the appellants - DP Naban & S Saravana Kumar; M/s Rosli Dahlan Saravana Partnership

For the respondent - Hazlina Hussain, Muazmir Mohd Yusof & Mohammad Hafidz Ahmad; Deputy Revenue Counsel

[Editor's note: Appeal from High Court Kuala Lumpur; Civil Appeal No: WA-14-4-03-2017 (affirmed).]

Reported by Lina E

JUDGMENT

Darryl Goon Siew Chye JCA:

[1] This was an appeal against the decision of the High Court in allowing an appeal by the Director General of Inland Revenue ('DGIR'), by way of case stated, against a deciding order of the Special Commissioners of Income Tax ('SCIT').

[2] The main issue in this appeal was whether real property gains tax ('RPGT') is payable upon the disposal of shares in a company whose total tangible assets consisted mainly of land.

[3] On 27 November 2015, pursuant to an appeal by the appellants, the SCIT had unanimously decided that a company by the name of Syarikat Bioford Development Sdn Bhd ('Bioford') was not a company subject to para. 34A of Schedule 2 of the Real Property Gains Tax Act 1976 ('RPGTA').

[4] Consequently, the SCIT unanimously decided that the acquisitions by each of the appellants of 56,025 shares in Bioford that were subsequently disposed of by them were not subject to para. 34A of Schedule 2 of the RPGTA.

[5] The effect of the SCIT's deciding order was that RPGT was not payable on the gains from the disposal of the said Bioford shares by the appellants.

[6] Dissatisfied with the decision of the SCIT, the DGIR required the SCIT to state a case for the opinion of the High Court pursuant to s. 34 of Schedule 5 of the Income Tax Act 1967.

[7] On 11 April 2018, the High Court delivered its decision on the case stated. The High Court allowed the DGIR's appeal and held that RPGT was payable on the gains made by the appellants upon the disposal of their said Bioford shares.

The Basic Facts

[8] Bioford was a company incorporated on 7 January 2004.

[9] By a sale and purchase agreement dated 8 September 2004, Bioford purchased a piece of land held under Grant 12115 Lot 29 Sek. 83 Bandar and District of Kuala Lumpur measuring approximately 4.862 acres from two companies, Mishika (M) Sdn Bhd and Maharta Sdn Bhd, for a consideration of RM14,500,000. The two companies were joint proprietors of the said land.

[10] It was not disputed that Bioford was a 'controlled company' within the meaning ascribed to that term under the Income Tax Act 1967. The term 'controlled company' is also used in the RPGTA and accorded the definition as is accorded the term under the Income Tax Act 1967.

[11] With the acquisition of the said property, Bioford owned real property the defined value of which exceeded 75% of its total tangible asset. In fact, the property represented in excess of 99% of Bioford's total tangible asset.

[12] It was not a disputed issue but for completeness, the term 'real property' is given the meaning 'any land situated in Malaysia and any interest, option or other right in or over such land' under s. 2 of the RPGTA.

[13] On 18 October 2004, the appellants each acquired 56,025 shares in Bioford. A

[14] By an agreement dated 9 August 2005, the first appellant disposed of its shares in Bioford to one Cheah Ah Wan.

[15] By an agreement also dated 9 August 2005, the second appellant disposed of its shares in Bioford to one Cheah Chuan Fatt. B

[16] In addition, there was evidence led that Bioford was in, or at least was entering into, the property business. Its acquisition of the said land was with a view to developing it.

[17] This intention was corroborated by evidence led, that on 30 November 2006 Bioford obtained permission from the Kuala Lumpur City Hall to develop its said land in a mixed development consisting of a condominium, shop-office and shop-lots. C

[18] Towards this end, Bioford had appointed various professionals to complete this project. Bioford had also marketed its intended development extensively and in addition, all expenditures incurred were entered into its books as property development expenditure. D

[19] Evidence was also led that the appellants had bought into Bioford because they had wanted to be involved in real property development. E

[20] It was the finding of the SCIT that this evidence led by the appellants was not rebutted. They are therefore to be accepted as fact.

[21] Following the sale of their shares in Bioford in 2005, the appellants filed the relevant forms through their solicitors, together with the relevant supporting documents. At the request of the DGIR, further documents were provided by the appellants. F

[22] Based on the documents supplied by the appellants, the DGIR issued notices of assessment to the appellants stating that RPGT was payable by each of the appellants. G

[23] By its notice of assessment to the first appellant dated 23 June 2011, the RPGT assessed to be payable was RM108,269.70.

[24] As for the second appellant, the notice of assessment issued was dated 19 February 2008 and the amount of RPGT assessed to be payable was RM496,585,20. H

[25] The calculation of the RPGT and the amounts assessed to be payable were not disputed by the appellants.

[26] The appellants however disputed that they were liable to pay any RPGT. In the words of learned counsel for the appellants, it was contended that: I

A ... RPGT is not payable because the Appellants acquired Bioford's shares with the intention to be involved in the property development market and Bioford was and is in the business of property development so therefore Bioford is a property development company and not a "real property company" within the ambit of Paragraph 34A Schedule 2 RPGTA 1976.

B **[27]** In the case stated by the SCIT dated 21 February 2017, the issue to be determined was set out to be as follows:

Whether Bioford Development Sdn Bhd ("Bioford Development") is a real property company pursuant to paragraph 34A of Schedule 2 of the Real Property Gains Tax Act 1976 ("RPGTA").

C If the answer is no, then the gains made by the Appellants from the disposal of 56,025 shares owned by the Appellants in Bioford Development are not subject to real property gains tax.

[28] These material facts disclosed were not disputed by the parties. The issue to be determined remained purely a legal one premised on a D construction of the relevant provisions of the RPGTA based on facts as found by the SCIT. There was thus no impermissible attempt to interfere with the primary facts as found by the SCIT (See *Chua Lip Kong v. Director General of Inland Revenue* [1981] 1 LNS 157; [1982] 1 MLJ 235 PC; *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813 CA).

E **Construction Of Revenue Legislation**

[29] In an often-quoted passage in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64, at p. 71 which was cited with approval by Viscount Simon LC in *Canadian Eagle Oil Co v. R* [1946] AC 119 at p. 140, F Rowlatt J stated thus:

In a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

G **[30]** This approach, when construing revenue legislation, has long been endorsed by our courts. See for example *Chin Choy & Ors v. Collector of Stamp Duties* [1978] 1 LNS 26; [1979] 1 MLJ 69, a decision of the Federal Court relating to the interpretation of the Stamp Ordinance 1949 and also the decision of the Supreme Court in *National Land Finance Co-operative Society* H *Ltd v. Director General of Inland Revenue* [1993] 4 BLJ 33; [1994] 1 MLJ 99.

[31] Since then, there has been further clarity of what the court's approach should be. In the United Kingdom, this was led by what is known as the '*Ramsay* principle' propounded by the House of Lords in *WT Ramsay Ltd v. IRC* [1981] STC 174; [1982] AC 300. See the explanation of this principle I by Lewison J in *Berry v. Revenue and Customs Commissioners* [2011] UKUT 81 (TCC); [2011] STC 105.

[32] In *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97, Steve Shim CJ (Sabah & Sarawak) explained the current approach. His Lordship, at pp. 275-276 (CLJ); pp. 108-109 (MLJ) of the report, stated thus:

> With respect, the principle of strict interpretation of statutes enunciated by Rowlatt J could not be regarded as the *locus classicus* on the issue. Indeed as long ago as 1899, Lord Russell of Killowen CJ took a different approach in *AG v. Carlton Bank* (1899) 2 QB 158, when he said *inter alia*:
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> > I see no reason why special canons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, *viz* to give effect to the intention of the legislature.
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> 13 In *Luke v. IRC* [1963] AC 557, Lord Reid in the House of Lords, echoed similar views. And much later, Lord Wilberforce expanded the principle in *WT Ramsay Ltd v. Inland Revenue Commission* [1982] AC 300 when he said as follows:
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> > A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act ... What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation.
> >
> > They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded ...
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> 14 This is known as the *Ramsay* principle. While clear words are needed before a tax can be imposed, what those words are would be interpreted in line with the purposive approach. Undoubtedly, in the United Kingdom, there is currently a more pronounced shift from the strict literal interpretation of a taxing statute. The *Ramsay* principle of statutory interpretation seems to have entrenched itself (see *Pepper (Inspector of Taxes) v. Hart* [1993] AC 593). In Malaysia, that principle should apply and it must be applied in consonance with s. 17A of the Interpretation Acts 1948/1967 which stipulates:
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> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
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> 15 It is pertinent to note that s. 17A was a recent amendment under the Interpretation (Amendment) Act 1997 (Act A996) and became effective on 25 July 1997. This would be after the National Land Finance Co-operative. In my view, the law is now clear beyond doubt. Section 17A above enjoins the purposive approach to statutory interpretation. **This applies to all statutes including taxing statutes.** That answers the second question posed. (emphasis added)

[33] In the same judgment of the Federal Court, Gopal Sri Ram FCJ took a slightly different perspective stating that s. 17A of the Interpretation Acts 1948 and 1967 did not have any impact on the court's approach but fits into, and is complementary of, the principles developed by the courts. As His Lordship explained:

> 78 In my judgment s. 17A has no impact upon the well established guidelines applied by courts from time immemorial when interpreting a taxing statute. Section 17A and these guidelines co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction. The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v. Inland Revenue Commissioner* [1971] AC 739:
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> > First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (*albeit* dissenting) judgment in *Marx v. Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
> >
> > Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. (Per Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v. Regeim* [1945] 2 All ER 499; [1946] AC 119).
> >
> > Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
> >
> > Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.
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> 79 In my respectful view, s. 17A of the Interpretation Acts 1948 and 1967 neatly fits into and is complementary with the third principle in the judgment of Lord Donovan. Hence, the governing principle is this. When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out therein. Imposing a tax by means of subsidiary legislation on a person not identified in the parent Act produces an absurd and unjust result and therefore does not promote its purpose or object.

[34] In the decision of the Federal Court in *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership)* [2015] 9 CLJ 273; [2015] 6 MLJ 612, Suriyadi FCJ reinforced the position stating as follows: A

> [43] A levy is a tax and in this case was created by the Act. It is well settled that the language of a statute imposing a tax, duty, charge or levy must be strictly construed, and with no intendment permitted. Words must be given their ordinary meaning. Nothing is to be read in, and nothing is to be implied, and once that meaning is clear due regard must be given to them. Any ambiguity detected must lean in favour of the taxpayer charged with paying the tax, duty, charge or levy (*Mangin v. Inland Revenue Commissioner* [1971] AC 739; *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64). B C
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> [44] The above general principles of interpreting a tax imposing statute are still woven into the fabric of the principles of construction of taxing provisions despite the introduction of s. 17A of the Interpretation Acts 1948 and 1967. Section 17A of the latter Act enjoins a purposive reading to be undertaken when interpreting a statute; with such statutory backing, a literal and blinkered approach must now compete with the context and purpose of the Act as legislated by Parliament. With a litany of cases in abundance, it is now well established that taxing statutes like all other statutes must be given a purposive interpretation to fulfil the objective of the statute, unless the circumstances demand otherwise. D E
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> [45] In this connection, it is useful to make reference to the decision of the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97 where the court spoke of the application of the *Ramsay* principle emphasising the purposive interpretation of taxing statutes. To make it clearer, we highlight the relevant portion and it reads: F
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> > 29 *The Ramsay* case [1982] AC 300 liberated the construction of revenue statutes from being both literal and blinkered. It is worth quoting two passages from the [2015] 6 MLJ 612 at 624 influential speech of Lord Wilberforce. First, (at p 323) on the general approach to construction: G
> >
> > What are 'clear words' is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded. H
> >
> > 30 Secondly (at pp 323-324), on the application of a statutory provision so construed to a composite transaction:
> >
> > > It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded. I

A 31 The application of these two principles led to the conclusion, as a matter of construction, that the statutory provision with which the court was concerned, namely that imposing capital gains tax on chargeable gains less allowable losses was referring to gains and losses having a commercial reality ('The capital gains tax was created to operate in the real world, not that of make-belief') and
B that therefore (p 326):

> To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous
C operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function.

32 The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature
D of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect; of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the
E abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v. Westmoreland*
F *Investments Ltd* [2003] 1 AC 311at p 320, para 8:

> The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.

G [46] It is significant to observe that the Federal Court in the case of *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 2 MLJ 1 endorsed the approach in the above *Palm Oil Research Board* case, hence settling the current interpretative position in our country. This court in *Alam Maritim Sdn Bhd* said: After tracing the history of how courts treat the interpretation of taxing Acts, culminating with the promulgation of
H s. 17A of the 1948 and 1967 Interpretation Acts and subsequent cases, the purposive approach is here to stay. The intention of Parliament therefore cannot be discounted even if the matter in the Act pertained to taxing issues.

[35] What is at least clear and indubitable is that s. 17A cannot be ignored. When interpreting an Act of Parliament, a construction that would promote
I its purpose or object is to be preferred over one that does not. No

differentiation is made of the types of legislation that come within its ambit. Therefore, this approach is to be employed in respect of all Acts of Parliament, including revenue legislation.

Paragraph 34A Of Schedule 2 Of The RPGTA

[36] Central to this appeal was para. 34A of Schedule 2 to the RPGTA since it was the appellants' contention that Bioford was not a 'real property company' within the meaning of that paragraph.

[37] It is, therefore, apposite that para. 34A be set out in full. Paragraph 34A provides as follows:

> **Acquisition and disposal of shares in real property companies**
>
> 34A(1) An acquisition of shares in a real property company (hereinafter referred to in this paragraph as "the relevant company") shall be deemed to be an acquisition of a chargeable asset, and where such shares are disposed of, such a disposal shall be deemed to be a disposal of a chargeable asset notwithstanding that at the time of disposal of such shares the relevant company is not regarded as a real property company.
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> (2) The chargeable asset in this paragraph shall be deemed to be acquired:
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> (a) on the date the relevant company becomes a real property company; or
>
> (b) on the date of acquisition of the chargeable asset.
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> (3) For the purposes of this paragraph, the acquisition price of a chargeable asset shall:
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> (a) where subparagraph (2)(a) applies, be deemed to be equal to a sum determined in accordance with the formula:
>
> $$\frac{A \times C}{B}$$
>
> where A is the number of shares deemed to be a chargeable asset;
>
> B is the total number of issued shares in the relevant company at the date of acquisition of the chargeable asset; and
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> C is the defined value of the real property or shares or both owned by the relevant company at the date of acquisition of the chargeable asset;
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> (b) where subparagraph (2)(b) applies, be determined in accordance with paragraph 4 or 9.

(4) Notwithstanding paragraph 5, the disposal price of the chargeable asset in this paragraph is the amount or value of the consideration in money or money's worth for the disposal of the chargeable asset.

(5) This paragraph shall not apply to an acquisition or a disposal of any shares under paragraph 34.

(6) For the purposes of this paragraph:

"controlled company" means a controlled company as defined under the Income Tax Act 1967;

"defined value" means the market value of real property or the acquisition price of shares as determined under subparagraph (3);

"real property company" means:

(a) a controlled company which, as at 21 October 1988, owns real property or shares or both, the defined value of which is not less than seventy-five per cent of the value of its total tangible assets; or

(b) a controlled company to which subsubparagraph (a) is not applicable, but which, at any date after 21 October 1988, acquires real property or shares or both whereby the defined value of real property or shares or both owned at that date is not less than seventy-five per cent of the value of its total tangible assets:

Provided that where at any date the company disposes of real property or shares or both whereby the defined value of real property or shares or both owned at that date and thereafter is less than seventy-five per cent of the value of its total tangible assets, that company shall not be regarded as a real property company as from that date;

"shares" refers to shares owned in a real property company;

"value of its total tangible assets" means the aggregate of the defined value of real property or shares or both and the value of other tangible assets.

[38] Paragraph 34A was an amendment to the RPGTA made under the Finance Bill of 1988.

[39] As a starting point for the appellants' contention, based upon the material facts disclosed, learned counsel referred to the explanatory statement in the Finance Bill 1988 which is set out below:

Clause 24 seeks to introduce a new paragraph 34A to Schedule 2 to the Act. The amendment is intended to ensure that individuals do not use companies to acquire land and then dispose of shares in such companies thereby avoiding payment of real property gains tax. The amendment applies only to controlled companies holding real property directly or indirectly as a major asset. Gains from the disposal of shares in such companies, which will be known as "real property companies", will be liable to tax.

[40] That parliamentary material may be used to assist in statutory interpretation is now well established (see *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal* [2016] 4 CLJ 12; [2016] 2 MLJ 309, FC and *Pepper (Inspector of Taxes) v. Hart and Related Appeals* [1993] 1 All ER 42, HL).

[41] It was the appellants' contention that based on the explanatory statement, in essence, para. 34A was specifically enacted to cater for individuals who use companies to acquire land and then dispose of shares in the company as a scheme to avoid payment of RPGT.

[42] It was maintained that the real property asset of Bioford, as a developer, was in fact its stock in trade. It was contended that Bioford was not used as a device to avoid RPGT but was a company genuinely involved in real property development and that was something which the appellants had wanted to be involved in.

[43] Thus Bioford, it was contended by learned counsel for the appellants, is a 'property development company' and not a 'real property company' within the ambit of para. 34A Schedule 2 RPGTA 1976.

[44] According to learned counsel for the appellant:

> ... the application of paragraph 34A should be limited to real properties that are held as investment properties by the subject company. In this instance the SCIT had found as fact that the Appellants had held Bioford as a vehicle for property development. The lands that were held by Bioford were its stock in trade meant for development. As such, the holding of shares by the Appellants in Bioford cannot be caught under paragraph 34A.

[45] In support of this contention, learned counsel for the appellants referred to the decision of the High Court in *Binastra Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2003] 5 CLJ 221; [2001] 5 MLJ 481.

[46] In *Binastra*, the High Court held that the taxpayer concerned had acquired shares in a company that was already a developer, having been alienated land by the Selangor State Government before the taxpayer acquired any shares in the company.

[47] Referring to the explanatory statement to the Finance Bill of 1988 (*supra*), Faiza Tamby Chik J in *Binastra*, at p. 227 (CLJ); p 487H (MLJ), stated as follows:

> 'The sequence of the shares' acquisition and subsequent disposal thereof by a real property company, which para 34A was designed to catch, is a factor in such assessment. The appellant is not an individual who had used a company 'to acquire land and then dispose of shares' in that company 'thereby avoiding payment of RPGT', having only bought shares in the Company which had already acquired the property to be developed.

[48] In His Lordship's view, '... the loophole Parliament sought to seal was the scheme whereby the dealer of a property uses a company as a vehicle to avoid the RPGT.' Thus, His Lordship observed that the fact that the taxpayer did not use the company to avoid RPGT, was alone sufficient to take the matter out of the ambit of para. 34A of Schedule 2 of the RPGTA.

[49] It would seem to follow, based on His Lordship's view, that the intention and the purpose for acquiring shares in a real property company would be important elements in determining whether para. 34A applies or not.

[50] It was in this context that the appellants contended that Bioford is a genuine property development company and the appellants had genuinely intended to be involved in a real property development company. In short, their contention was that they too were not using Bioford as a means to avoid RPGT.

[51] On another aspect of para. 34A, His Lordship in *Binastra* also held as follows:

> Paragraph 34(2) Sch 2 of the Act is a deeming provision. To give the words used their ordinary meaning, there must be a 'chargeable asset' before we look at what is 'deemed to be chargeable assets'. Where there is no chargeable asset, the question of what is 'deemed to be chargeable assets' does not arise. The policy of para 34(6) of Sch 2 of the Act is to bring within the provision of the Act disposal of shares, 'deemed to be chargeable assets'. *The crux of the matter here is that before one treats the shares as deemed to be 'chargeable assets', one has to determine whether there is a 'chargeable asset' within the meaning of s. 3 of the Act. As the 'chargeable gain' falls within the ambit of income tax law, the gain does not fall under s. 3 of the Act to be treated as 'chargeable gain', and hence the asset is not a 'chargeable asset'.*
>
> (emphasis added)

[52] The decision in *Binastra* was appealed by the DGIR. The DGIR's appeal was allowed by the Court of Appeal. However, there were no written grounds of judgment given for the Court of Appeal's decision.

[53] The DGIR's contention was essentially that the distinction and exception sought to be made by the appellants are not to be found anywhere in the RPGTA. It was contended that Bioford is a controlled company that meets the definition of a 'real property company' provided under para. 34A(6) of Schedule 2 and as such the acquisition of shares in Bioford is 'deemed' an acquisition of a 'chargeable asset' and their subsequent disposal was clearly a disposal of a 'chargeable asset'. This then leads back to the taxing provision in s. 3 of the RPGTA which provides for a tax to be charged in respect of chargeable gain accruing upon the disposal of any real property which term is referred to as a 'chargeable asset'.

[54] The DGIR also pointed out that since its appeal against the decision in *Binastra* was allowed by the Court of Appeal, *Binastra* is no longer good law. This attracted the response from the appellants that the decision of the Court of Appeal was not binding as there were no grounds provided and therefore its *ratio decidendi* cannot be determined. Suffice to say that this issue provides no impediment to this court's determination of the issues in this appeal. However, a reasoned judgment was delivered in *Binastra* and it therefore has to be given due and careful consideration.

Is Bioford A 'Real Property Company' Pursuant To Paragraph 34A Of Schedule 2 Of The RPGTA?

[55] It would be pertinent to begin by considering s. 17A of the Interpretation Acts 1948 and 1967.

[56] Section 17A is clearly not license to ignore words used in a legislation with liberty to roam around hunting for what might be regarded to be the purpose or object of Parliament in any given piece of legislation.

[57] Section 17A, upon its proper construction, is predicated upon having first interpreted a given legislation, or a provision in a legislation, and only when confronted with a construction that promotes the purpose or object of Parliament and one that does not, the former is to be preferred.

[58] To be confronted with such alternative constructions, should they exist, the process of construction must first be undertaken based on the words actually used by Parliament in the legislation being interpreted.

[59] It is only after interpreting the legislation upon the words to be found therein and being confronted with possible alternative constructions that the true purpose of s. 17A would be brought into play.

[60] Any suggestion to the contrary would necessarily mean that even when clear and unambiguous words are employed by Parliament in a legislation they may be ignored and some other supposed purpose of Parliament superimposed onto the legislation. Such would lead to a legally preposterous state where the words used in a legislation matter not.

[61] It is in this context that reference is to be made to what Gopal Sri Ram FCJ stated in the *Palm Oil Research and Development Board* case cited above and His Lordship's reference to the advice delivered on behalf of the Privy Council by Lord Donovan in *Mangin v. Inland Revenue Commissioner* [1971] AC 739, the relevant portions of which are repeated below with emphasis added:

> **First,** the **words are to be given their ordinary meaning.**
>
> **Secondly**, '... **one has to look merely at what is clearly said.** There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. **Nothing is to be read in, nothing is to be**

A **implied.** One can only look fairly at the language used'. (Per Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v. Regeim* [1945] 2 All ER 499; [1946] AC 119).

Thirdly, the object of the construction of a statute being to ascertain the
B will of the legislature, it may be presumed that neither injustice nor absurdity was intended. **If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.**

Fourthly, the history of an enactment and the **reasons which led to its being passed may be used as an aid to its construction.** (emphasis added)
C

[62] As can be seen, primacy is given to the words used in a legislation.

[63] At the High Court, the learned judge gave careful consideration to the decision of the Federal Court in *Palm Oil Research and Development Board* case. Having done so, His Lordship concluded as follows:

D

57. Therefore, it is my view that the purposive approach is adopted in a situation where the provision in the tax statute does not provide plain and unambiguous language. Section 17A of the Interpretation Acts 1948 and 1967 will only be invoked when it is required by the Court to adopt an approach that produces neither injustice or absurdity. In other words, an
E approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out therein.

[64] Having construed para. 34A itself, His Lordship went on to hold as follows:

78. It is my view that the intention behind the introduction of the
F provision may be used as to aid its interpretation in cases of ambiguity. The test of a "real property company" in Paragraph 34A is so clearly worded in the provision that there is no ambiguity. The test as laid out in *Mangin* (and, subsequently, by the Federal Court in *Palm Oil Research*) the test as to whether Bioford is a "real property company" within the
G ambit of Paragraph 34A is an objective one.

...

83. I agree with Revenue that in this case no injustice or absurdity would arise from construing Paragraph 34A to give the words their ordinary and natural meaning. The law as laid out in Paragraph 34A Schedule 2
H RPGTA 1976 is clear and unambiguous. The test to determine whether Bioford is a 'real property company' is also clearly set out and that it matters not whether the intention of the Taxpayers in acquiring the shares is for engaging in property development. Applying the test objectively Bioford is a 'real property company' within the ambit of Paragraph 34A. Therefore, the Respondent's disposal of Bioford's shares are subject to
I RPGT.

[65] In so holding His Lordship also made clear that he did not agree with the decision of the High Court in *Binastra*. Notwithstanding the fact that no grounds were given by the Court of Appeal when the appeal against the decision of the High Court was allowed, His Lordship also held, quite correctly in our view, that the decision in *Binastra* was not binding on him.

[66] It was quite clear that His Lordship in the High Court had given very careful consideration to the authorities and to the legal approach that he had to employ in interpreting para. 34A of Schedule 2 of the RPGTA.

[67] We too have arrived at the same conclusion. Paragraph 34A leaves no room for any doubt as to what is to be regarded as a 'real property company' or the fact that the acquisition of shares in such a company is deemed the acquisition of a 'chargeable asset'.

[68] Nowhere in the legislation is it provided, or even hinted, that only a company that is used by its shareholder and intended as a device or means to avoid RPGT may be regarded as a 'real property company' falling within the ambit of para. 34A.

[69] Such is also not to be implied especially where the ordinary meaning of the expressed words employed are clear and unequivocal.

[70] Clearly, the explanatory statement in the Finance Bill 1988 cannot be read into para. 34A where there is no apparent basis or justification for so doing.

[71] Indeed, the explanatory statement may be viewed in two possible ways. A literal and narrow view of this statement, as suggested by the appellants, would be that para. 34A is only intended for real property companies that are set up or used by its shareholders to avoid RPGT and not intended to apply to genuine property development companies. Paragraph 34A, according to the appellants' submission, was therefore in effect introduced merely as an anti-tax avoidance provision in this limited sense.

[72] This narrow interpretation would perforce call for a determination of the objective or intention of a shareholder in acquiring the shares in a real property company. This however would provoke the question why, despite meeting all criteria expressly set out under para. 34A, RPGT may only be levied depending on the intention of the shareholder.

[73] In addition, if para. 34A was intended purely as an anti-avoidance provision, there is already to be found such a provision in s. 25 of the RPGTA. Section 25 provides *inter alia* as follows:

Anti-avoidance provisions

25 (1) ...

(2) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of:

(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;

(b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;

(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or

(c) hindering or preventing the operation of this Act in any respect,

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such assessments as he considers just and proper in the circumstances.

(3) In this section "transaction" means any trust, grant, covenant, agreement, arrangement or other disposition or transaction made or entered into (whether before or after the commencement of this Act), and includes a transaction entered into by two or more persons with another person.

[74] The fact is, shares in what is defined as a 'real property company' were never a chargeable asset for the purposes of RPGT prior to the introduction of para. 34A. Paragraph 34A changed that by deeming it to be so. The fact that shares in such a company had to be deemed to be a 'chargeable asset' confirms that they in fact are not or may not be, but are nevertheless to be regarded as such by virtue of para. 34A. Such is the effect of a deeming provision (see *R v. Norfolk County Council* (1891) 60 LJ QB 379).

[75] A wider view of the explanatory statement in the Finance Bill 1988 is that in order to overcome avoidance of RPGT by the use of companies, acquisitions and disposals of shares in all 'real property companies', as defined, are deemed acquisitions and disposals of a 'chargeable asset'.

[76] In this regard, a 'real property company' is given a specific meaning and one which requires that the company owns real property and/or shares in a real property company the defined value of which is not less than 75% of the 'value of its total tangible assets'.

[77] The 'value of its total tangible assets' is in turn defined to mean 'the aggregate of the defined value of real property or shares or both and the value of other tangible assets.'

[78] This requirement would allow for a justifiable assumption that the value of real property directly or indirectly owned by such a company would probably be reflected in the value of its shares. In the absence of such a

nexus, the tax imposed would have no connection to what is set out in the preamble to the RPGTA which declares it to be, 'An Act to provide for the imposition ... of a tax on gains derived from the disposal of real property and matters incidental thereto.'

[79] Given the provision in para. 34A that in effect deems shares in a real property company to be a 'chargeable asset', a wider view of the explanatory statement makes more logical sense. The object of para. 34A, upon the very words used, was to deem as chargeable asset something that was not regarded as a chargeable asset prior to the introduction of para. 34A.

[80] The focus of the legislation is on the shares of a real property company as defined and not on the intention or objective of a person who acquires or disposes of shares in such a company.

[81] As a chargeable asset, it then comes within the ambit of s. 3 of the RPGTA. For completeness, s. 3 is set out below:

> Taxation of chargeable gains
>
> 3(1) A tax, to be called real property gains tax, shall be charged in accordance with this Act in respect of chargeable gain accruing on the disposal of any real property (hereinafter referred to as "chargeable asset").
>
> (2) Subject to this Act, the tax shall be charged on every ringgit of the total amount of chargeable gains accruing to a chargeable person in a year of assessment in respect of each category of disposal of chargeable assets specified in Schedule 5.

[82] Section 3 imposes a tax in respect of chargeable gain accruing on the disposal of any 'real property', which term is then referred to as 'chargeable asset'. Thereafter the legislation uses and focuses on the term 'chargeable asset' rather than the term 'real property'.

[83] Paragraph 34A on the other hand deems the acquisition of shares in a 'real property company' to be an acquisition of a 'chargeable asset'. In addition, it also deems the disposal of such shares to be a disposal of a 'chargeable asset'. Rather than to deem such shares 'real property', what was done was to equate all provisions pertaining to 'chargeable asset' in the legislation, unless otherwise expressed, applicable to the acquisition and disposal of shares in a real property company, as defined. This also addresses the other issue raised in the judgment in *Binastra.*

[84] The net result, simply put, is RPGT would be levied on a chargeable gain made upon the disposal of shares in a real property company as defined. From the plain words employed, that was the legislative solution to the problem identified in the explanatory statement in the Finance Bill of 1988.

[85] As for Bioford, as a property development company, any profit it makes in disposing its real property would be likely to attract income tax. As such, any gain made in such disposal would not be regarded as a 'gain' under the RPGTA. This is because, under the RPGTA, 'gain' is given the meaning '(a) gain other than gain or profit chargeable with or exempted from income tax under the income tax law ...'

[86] Therefore, a construction of para. 34A in accordance with the plain words employed by Parliament gives rise to neither injustice nor absurdity or even inconsistencies or incompatibilities with the purpose or object of para. 34A, when read with the explanatory statement found in the Finance Bill 1988.

[87] Interpreting para. 34A as suggested by the appellants would not only violate the clear words used by Parliament but would also have the effect of limiting or qualifying what is deemed a 'chargeable asset', when there is no justification to do so.

[88] My learned sister Hanipah binti Farikullah JCA and my learned brother S Nantha Balan JCA have each had the opportunity to read this judgment in draft and have concurred with the grounds stated.

Conclusion

[89] In light of the foregoing, the answer to the question whether Bioford is a 'real property company' under para. 34A of Schedule 2 of the RPGTA was in the affirmative. The decision of the learned High Court Judge was affirmed. The appellants' appeal was dismissed with costs.